

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter of:

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6 440 WEST 164TH STREET HOUSING

7 DEVELOPMENT FUND CORPORATION, Case No. 15-20003-rdd

8

9 Debtor.

10 - - - - - x

11 INNA KHITERER, INDIVIDUALLY

12 AND DERIVATIVELY,

13 Plaintiff,

14 v. Adv. Case No. 15-08276-rdd

15 440 WEST 164TH STREET HOUSING

16 DEVELOPMENT FUND CORPORATION,

17 Defendant.

18 - - - - - x

19 KROLL, ET AL.,

20 Plaintiffs,

21 v. Adv. Case No. 15-08277-rdd

22 440 WEST 164TH STREET HDFC,

23 et al.,

24 Defendants.

25 - - - - - x

U.S. Bankruptcy Court
300 Quarropas Street
White Plains, New York

July 28, 2015

10:35 AM

B E F O R E :

HON ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

Hearing re: Adv. - 15-08276 - Pre-trial Conference

Hearing re: Adv. 15-08276 - Answer to Complaint (Related
Doc # 1), Counterclaim against Inna Khiterer, individually
and derivatively on behalf of 440 West 164th Street Housing
Development Fund Corporation filed by Candace C. Carponter
on behalf of FIA 164 Holdings LLC, Mark Schwartz (Document
#4)

Hearing re: Adv. 15-08276 Answer to Counterclaim (Related
Doc #4)(related document(s)4)

1 Hearing re: Adv. 15-08277 - Status Conference on Notice of
2 Removal

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25 Transcribed by: Dawn South

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1 P R O C E E D I N G S

2 THE COURT: Okay. In re: 440 West 164th Street
3 Housing Development Fund Corporation. The two pretrial
4 conferences.

5 MR. PICK: Good morning, Your Honor. Douglas
6 Pick --

7 THE COURT: Good morning.

8 MR. PICK: -- counsel to Inna Khiterer. To my
9 right is Ms. Khiterer.

10 THE COURT: Okay.

11 MR. FRANKEL: Mark Frankel, Backenroth Frankel &
12 Krinsky, attorneys for the debtor.

13 MR. SCHWALB: Efrem Schwalb from Koffsky & Schwalb
14 for the debtor as well.

15 MR. GREENE: A. Mitchell Greene of Robinson Brog
16 Leinwand Greene Genovese & Gluck for the secured creditor
17 SAC, and it's a long number, and David Goldwasser (ph).

18 THE COURT: Okay. All right. Everyone can seat
19 down unless they're speaking.

20 Why don't we deal with Khiterer versus 440 West
21 164th Street Housing Development Fund Corp., et al., the
22 bankruptcy complaint as opposed to the one that was removed.
23 Let's deal with that one first.

24 I note that there have been -- that there's a
25 motion to dismiss that I'm going to be hearing on

1 August 20th?

2 MR. SCHWALB: Correct, Your Honor.

3 THE COURT: Okay. And is that to dismiss all of
4 the claims?

5 MR. SCHWALB: It's to dismiss all of the claims
6 against the debtor.

7 THE COURT: Against the debtor.

8 MR. SCHWALB: Yeah.

9 THE COURT: All right.

10 MR. SCHWALB: And I didn't think about --

11 THE COURT: So it wouldn't dispose of the whole
12 litigation then I guess or would it? I'm just trying to
13 figure out whether there should be anything happening in the
14 meantime.

15 MR. SCHWALB: It should. The other -- the
16 creditor has to file something, but the creditors that have
17 been sued, that case would be dismissed completely, because
18 it really only challenges an election that took place, and
19 the grounds -- sorry -- the motion would be grounds for
20 dismissing the entire case.

21 THE COURT: Okay. All right. So, I guess it
22 doesn't make sense to have any discovery between now and
23 August 20th?

24 MR. SCHWALB: Correct. I don't believe so.

25 THE COURT: Okay. All right. Okay. Is there

1 anything more to be said on this one then?

2 MR. PICK: No, Your Honor. I think basically
3 response papers are due on August 13th, we'll have them
4 filed. We had the motion to dismiss, it's frivolous, but
5 we'll address it.

6 THE COURT: Okay. All right. Let me just address
7 one thing here.

8 The motion may deal with this, but the answer
9 really didn't deal with the jurisdictional allegations in
10 paragraphs 2, 3, and 4 of the complaint.

11 The first one is that the Court has jurisdiction
12 over the adversary proceeding, which of course you don't
13 necessarily need to -- you're not barred by failing to deny
14 that.

15 Paragraph 3 says this is a core proceeding.

16 And paragraph 4 says to the extent that it's not
17 core the debtor consents to the entry of final orders and
18 judgments. The answer just says denies naja (ph) or
19 information sufficient to form a belief as to the truth of
20 the allegations, and I think you really need to be more
21 specific on that.

22 MR. SCHWALB: Your Honor --

23 THE COURT: Now the motion to dismiss may deal
24 with all that, I haven't read it yet.

25 MR. SCHWALB: We didn't file an answer, we moved

1 to dismiss, so it's --

2 THE COURT: All right.

3 MR. SCHWALB: -- the attorney actually is not
4 here.

5 THE COURT: All right.

6 MR. SCHWALB: She's coming through security.

7 THE COURT: Oh.

8 MR. SCHWALB: But we'll obviously --

9 THE COURT: You should relate that to her.

10 MR. SCHWALB: Absolutely.

11 THE COURT: I need to know literally on whether
12 there's an agreement or disagreement with each of those --

13 MR. SCHWALB: Okay, Your Honor.

14 THE COURT: -- of those provisions -- those
15 paragraphs of the complaint. And I would like them filed
16 and then get answered. And obviously we'll deal with that.

17 Okay. So why don't we move on then to the removed
18 adversary proceeding.

19 Well actually before we do obviously the motion to
20 dismiss just deals with the claims against the debtor, which
21 you say in all likelihood would end with a dismissal of the
22 complaint. There were counterclaims.

23 MR. FRANKEL: Yes, there are counterclaims.

24 THE COURT: So, I guess even if I granted the
25 motion we'd still have to deal with the counterclaims.

1 MR. SCHWALB: Correct, Your Honor.

2 THE COURT: So I think in preparation for the
3 hearing on August 20th, Mr. Pick, you should discuss with
4 the counterclaim plaintiffs a discovery schedule. Or maybe
5 there's agreed facts and we can just move to summary
6 judgment, I don't know, but I'd like to have that topic be
7 on the agenda for August 20th as well as the motion to
8 dismiss.

9 MR. SCHWALB: Your Honor, when I last spoke to
10 counsel for those creditors who filed their answer and
11 counterclaims I understand that they're going to be filing a
12 motion on the pleadings. They answered, but they intend to
13 file a motion on the pleadings, because the documents
14 themselves would resolve the entire lawsuit as well.

15 THE COURT: Well that's not going to be on for the
16 20th, I don't think there's enough time for that, but you
17 should discuss it and maybe agree on a timetable and a
18 briefing schedule or whatever. And if you disagree and you
19 believe that discovery is warranted, you know, I can treat
20 it as a pre-motion conference.

21 MR. PICK: Will do.

22 THE COURT: Okay. All right. So now why don't we
23 turn to the second adversary, which is the removed state
24 court proceeding, which now is against only FIA, SAC, and
25 the principals I guess, right? Riverside and New York City

1 are out, and I guess the debtor, although I'm not sure how
2 the debtor is a party to this one other than as a nominal
3 party.

4 MR. PICK: I think with respect to the removed
5 action it's entwined with respect to our action, and maybe
6 the best way to proceed is to combine -- consolidate the two
7 actions into one proceeding.

8 THE COURT: Well they're different -- there's
9 clearly different reliefs being sought. I mean --

10 MR. PICK: Agreed.

11 THE COURT: -- in addition to the relief sought in
12 the bankruptcy action, which is really just over the vote
13 and the counterclaims, which are similar to the
14 counterclaims in the removed action, there's basically
15 contract claims, and I think those are going to have a life
16 of their own.

17 MR. SCHWALB: Well, I think we actually are in
18 agreement that with the counterclaims, once the -- if the
19 bankruptcy case has the counterclaims in it the plaintiffs'
20 claims are the reverse of the counterclaims, so --

21 THE COURT: Okay.

22 MR. SCHWALB: -- they actually overlap.

23 THE COURT: All right. But it's not on for the
24 20th, that's just the election, that's just dealing with the
25 election.

1 MR. SCHWALB: Correct.

2 THE COURT: All right.

3 MR. SCHWALB: That's dealing with the election,
4 that's correct.

5 THE COURT: Okay. So what I said earlier about
6 meeting and conferring with the counterclaim plaintiffs I
7 think goes for this one too. You should meet and confer
8 before the 20th. I'll use the 20th as a date where we'll
9 set the discovery schedule, to the extent we need one, or
10 alternatively, you know, you will have agreed on a briefing
11 schedule on dealing with the counterclaims and the contract
12 claims in the removed action.

13 MR. PICK: We should be able to do that.

14 THE COURT: Okay. All right. Okay. I guess
15 there's one point that I wanted to raise.

16 I read the state court's memo decision denying the
17 request for a preliminary injunction. A lot of it was
18 obviously based on preliminary injunction law and the nature
19 of the complaint. But there was one statement in it that I
20 think may be contradicted by an answer to the counterclaim,
21 which is that the plaintiffs don't deny that the full amount
22 of money was paid for the five apartments?

23 MR. SCHWALB: There was money put in escrow,
24 \$125,000 was put in escrow, so that money I think everybody
25 agrees has not been transferred because the plaintiffs

1 hasn't signed transfer documents, so it's waiting for --

2 THE COURT: Well for whatever reason it's still
3 sitting --

4 MR. PICK: In escrow.

5 THE COURT: -- in escrow.

6 MR. SCHWALB: There is -- in the state court
7 complaint there is also a claim that additional money was
8 supposed to be negotiated -- there's no contract that says
9 anything like this -- but that apparently orally there was
10 some agreement to pay more money for the apartments, a
11 couple of hundred thousand dollars was the negotiation that
12 was supposed to take place, and that would be the subject of
13 the motion on the pleadings that that oral agreement is an
14 oral agreement and can't be enforced.

15 THE COURT: But the -- so the reference in the
16 state court judge's -- let me just -- I'll quote it.

17 Page 6:

18 "Finally defendants contend that they have in fact
19 paid plaintiffs all of the money owed them under the
20 contracts for sale of all of the apartments and that
21 plaintiffs in fact have acknowledged receipt of those
22 funds. Plaintiffs do not dispute this allegation."

23 Now, I guess what -- do you dispute it or is it
24 only as to whether there's this other money that hasn't been
25 paid that counsel for the debtor was taking about?

1 MR. PICK: Your Honor, it's a great question.

2 With respect to what the parties had understood,
3 and under the five so-called contracts, the monies under
4 those contracts have either been paid or were held in
5 escrow.

6 THE COURT: Okay. But the issue is whether
7 there's something else.

8 MR. PICK: That's correct.

9 THE COURT: And that's the subject of the
10 impending motion on the counterclaims.

11 MR. PICK: Well the issue goes a little bit
12 further, it goes beyond the point of just simply whether or
13 not there's additional monies owed, the contracts don't
14 appear to be unenforceable on their face, and in addition
15 they're contingent --

16 THE COURT: Well, all right, but I'm just -- I was
17 just trying to get down that one fact, because there was a
18 -- in the answer to the counterclaims there was denial that
19 the money had been paid, and I guess I now understand the
20 basis for that denial.

21 Okay. All right. Anything else? No? Okay.

22 Ma'am, your counsel for --

23 UNIDENTIFIED SPEAKER: I'm the counsel for FIA --

24 THE COURT: -- FIA. Okay.

25 UNIDENTIFIED SPEAKER: 164.

1 THE COURT: So I had asked both counsel for the
2 debtor and Mr. Pick, who's representing plaintiffs, to speak
3 with you about a couple of things.

4 UNIDENTIFIED SPEAKER: Okay.

5 THE COURT: Which they'll do.

6 One is whether you're going to join in the
7 debtor's motion to dismiss, which is going to be heard on
8 August 20th.

9 The second is that you need to address paragraphs
10 2, 3, and 4 of the complaint in the bankruptcy action more
11 specifically than you did in the answer, and I would give
12 you time to do that. The answer just had a deny information
13 and belief, but they really point that you need to either
14 deny or agree with, including, for example, if this is not
15 core or covered by outside of Stern v. Marhsall whether you
16 consent to a final ruling or not. I need to know that
17 before August 20th.

18 UNIDENTIFIED SPEAKER: No problem, Judge.

19 And with regard to joining in the motion --

20 THE COURT: Right.

21 UNIDENTIFIED SPEAKER: -- the answer is yes.

22 THE COURT: Okay. And something needs to be filed
23 to do that.

24 UNIDENTIFIED SPEAKER: No problem, Judge.

25 THE COURT: And then lastly I understood that it

1 was likely that on the counterclaims you were going to be
2 filing a motion fairly soon on the pleadings and/or -- I
3 guess that's it, although I don't want to put words in your
4 mouth.

5 UNIDENTIFIED SPEAKER: Yeah, I'm not sure, Judge.

6 THE COURT: Okay.

7 UNIDENTIFIED SPEAKER: On that I'm not sure.

8 THE COURT: All right. Or whether you're going to
9 make a request for summary judgment, I just don't know, but
10 given that there's a motion to dismiss on for August 20th
11 there won't be any discovery between now and then.

12 You should meet and confer with Mr. Pick about a
13 briefing schedule and get a hearing date if you're going to
14 be making a motion on the pleadings.

15 If you want to make a summary judgment motion
16 based on the documents you should just set up a call with
17 chambers and Mr. Pick under the local rule so I have a heads
18 up on that. And if you're not going to do either you should
19 speak with him on an outside date, a termination and
20 discovery date, so that you'll have thought about that and
21 we can discuss that on August 20th, because my pretrial
22 order sort of all flows from that discovery cutoff date.

23 UNIDENTIFIED SPEAKER: No problem, Judge.

24 THE COURT: Okay.

25 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

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THE COURT: Okay.
(Whereupon these proceedings were concluded at 10:49
AM)

C E R T I F I C A T I O N

I, Dawn South, certify that the foregoing transcript is a
true and accurate record of the proceedings.

Dawn South

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Date: July 30, 2015

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